

After reviewing the entire file, the Appeals Board makes the following findings of fact and conclusions of law:

At the oral argument in this matter, the attorney for the respondent acknowledged with regard to issue Number 2, that service of demand is not required by registered mail and further acknowledged that the case of Kelly v. Phillips Petroleum Co., 222 Kan. 347, 566 P.2d 10 (1977), allows that the use of certified rather than registered mail constitutes substantial compliance with the statute. The Appeals Board, therefore, finds this issue should be dismissed.

Respondent's attorney further acknowledged at oral argument that K.S.A. 44-512a(b) grants the employee the right to maintain an action to collect penalties. Respondent's counsel agrees that his contention that the penalties should be made payable to the medical creditors is contrary to K.S.A. 44-512a and, as such, this issue should also be dismissed.

With regard to issue Number 3, respondent's attorney provided no statutory or case law support for his argument that claimant is electing inconsistent and separate remedies by filing both a request for penalties under K.S.A. 44-512a and, a complaint alleging fraud and abuse under K.S.A. 44-5,120. A review of the statutory and case law elicits no restriction against claimant's filing under both sections. K.S.A. 44-512a is a penalty statute intended to ensure compliance in timely payment situations. The language of K.S.A. 44-512a makes it clear the statute is intended to require payment by the respondent within a specific period of time. Payments that are late will result in penalties of either ten percent (10%) of the unpaid medical bills or twenty-five dollars (\$25.00), whichever is greater.

The fraud and abuse statutes, on the other hand, were created by the legislature to punish not only respondents but all persons associated with a workers compensation claim who deliberately violate the intent of the law. K.S.A. 44-512a is a statute intended to require timely payment compliance. K.S.A. 44-5,120 is a statute intended to punish deliberate, intentional and/or wanton acts that violate the letter and intent of the Workers Compensation Act. As such these statutes, in dealing with separate and distinct remedies of law and not being mutually exclusive, can be brought by the same claimant against the same respondent with no due process violation resulting therefrom. In further support of this position the Appeals Board cites the recent Kansas Court of Appeals case of Elliot v. Dillon Co., (#73,478), opinion filed (Jan 5, 1996). The Appeals Board, therefore, finds the respondent's contention that claimant has elected an inconsistent and separate remedy by filing both under K.S.A. 44-512a and K.S.A. 44-5,120 is not supported by the law and respondent's appeal on this issue is denied.

Respondent's final issue of contention is that there is no order of Judge Robertson requiring the payment of any of these bills against which penalties were assessed. A review of the Order of Judge Robertson dated December 12, 1994, finds language to the effect "that E S Webb and Company are liable for any and all payments on medical and temporary total disability that are due and owing Scott Ehram." Claimant's Exhibit #4 to the November 10, 1994 preliminary hearing itemizes medical bills totalling eight thousand three hundred fifty-six dollars and fifteen cents (\$8,356.15). There is no doubt from reviewing the record that Judge Robertson, in his Order, intended respondent, E.S. Webb and Company, to pay the medical bills listed in claimant's Exhibit #4. The Appeals Board, after reviewing the evidence, cannot comprehend how any other understanding of the

Judge's Order could have been reached. Furthermore, respondent concludes that no issue was raised as to the reasonableness or necessity of any of the bills.

The medical bills list presented at the hearing on claimant's Motion for Penalties held August 2, 1995 and claimant's Demand for Payment of Compensation Benefits served March 30, 1995, contain a list of medical bills nearly identical to claimant's Exhibit #4 from the November 10, 1994 hearing. The only difference is that additional medical bills were included which raise the total to nine thousand two hundred eighty-five dollars and eighty-five cents (\$9,285.85).

The Appeals Board finds it unconscionable that, of the bills listed as Exhibit #4 in the November 1994 hearing, not a single bill had been paid as of the August 1995 Motion on Penalties hearing. The Appeals Board acknowledges a dispute did exist between the respondent and its insurance carrier regarding what, if any, coverage existed on the date of the accident. While these disputes may be disconcerting to the respondent, they are not the responsibility of the claimant and did not occur as a result of any action taken by the claimant. The respondent, under the Kansas Workers Compensation Act, has a responsibility to provide workers compensation benefits to its employees. The dispute between respondent and its insurance carrier should have no effect upon the claimant's right to medical treatment and the claimant's right to expect a timely payment of the medical expenses associated with his claim. The respondent's obligation to pay these bills was clearly ruled upon in the Order issued by the Administrative Law Judge from the November 10, 1994 hearing.

Claimant's counsel, at oral argument before the Appeals Board, argued respondent's actions in this matter constituted stonewalling and respondent's objections were being raised purely to grant respondent additional time in which to pay the bills or even to delay payment of the bills with little or no justification for same. The Appeals Board concurs, having found no legitimate reason for respondent's failure to pay these medical bills in the record.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order on Motion for Penalties of Special Administrative Law Judge William F. Morrissey dated August 8, 1995, should be, and is hereby, fully affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: E. L. Lee Kinch, Wichita, Kansas
Michael T. Harris, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director